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In the Supreme Court of the United States

October Term, 1983

WILLIAM KIRALY,
Petitioner,

vs.

CLARENCE CLARK, Chairman,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RICHARD L. AYNES
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751
Counsel of Record for William Kiraly, Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

QUESTIONS PRESENTED FOR REVIEW

I. Whether a Federal District Court has the power to grant a habeas corpus petitioner leave to amend his petition to add unexhausted claims to a petition in which it was conceded that only exhausted claims had been initially raised? *See Rose v. Lundy*, 455 U.S. 507 (1982).

II. Whether in order to exhaust state remedies a petitioner may be required to file a third new trial motion which the state trial judge has already indicated will be overruled on the merits?

III. Whether a petitioner can be said to have as an unexhausted state remedy a third new trial motion when such a motion requires a specific factual showing that he was unavoidably detained from filing it within 120 days of trial and neither the Respondent nor the Federal Courts identify the factual basis which would support such a claim?

IV. Whether the rationale of *Rose v. Lundy*, 455 U.S. 507 (1982), can properly be extended to apply to a habeas corpus petitioner who, unlike the petitioner in *Rose*, is no longer in custody and hence cannot refile an amended petition?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is reproduced in the Appendix (hereinafter "App.") at A1-A3. The opinion of the Federal District Court denying the motion to alter or amend is unreported and is reproduced at App. A4-A6. The opinion of the Federal District Court dismissing the Petition for Writ of Habeas Corpus is unreported and is reproduced at App. A7-A31. The opinion of the Ohio Court of Appeals affirming the judgment of conviction is reported at 56 Ohio App. 2d 37, 381 N.E. 2d 649 (1977) and is reported at App. A32-A56. The decision of the Ohio Court of Appeals denying reconsideration is unreported and reproduced at App. A57-A58. The two journal entries of the State trial court denying Mr. Kiraly's second Motion for a New Trial are unreported and reproduced at App. A59-A60.

JURISDICTION

The Sixth Circuit's Decision affirming the Judgment of the District Court below was issued on December 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Ohio Revised Code § 2909.02, Aggravated Arson, provides:

> (A) No person, by means of fire or explosion, shall knowingly:
>
> • • • • •
>
> (2) Cause physical harm to any occupied structure;
>
> • • • • •

Ohio Revised Code § 2923.01, Conspiracy, provides:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, . . . aggravated arson or arson, . . . shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

* * * * *

Ohio Criminal Rule 33 (B) provides:

Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

STATEMENT OF THE CASE

In 1975 a three-count indictment was returned against William Kiraly and Joseph Gallo. Count one was for attempted aggravated murder in violation of R.C. §§ 2903.01 and 2923.02; count two was for aggravated arson, R.C. § 2909.02; and count three was for conspiracy to commit aggravated murder, R.C. § 2923.01. All three counts involved the destruction of a building owned by Daniel Greene. Prior to trial count one was dismissed.

At trial Mr. Kiraly maintained his innocence by entering a plea of not guilty and exercising his right to trial by jury. He did not testify in his own behalf because the trial judge refused to grant a motion *in limine* which would have prohibited the prosecutor from using a 36-year-old robbery conviction to impeach him. Mr. Kiraly both contested the state's proof and presented an alibi defense.

In spite of the seriousness of these charges, the State's evidence was slight. The State demonstrated only that Mr. Kiraly was being surveilled by members of the F.B.I. organized crime unit; that he was seen together with Joseph Gallo on several occasions; that he was seen in the area of Mr. Greene's home (which was a three-minute drive from Mr. Kiraly's brother's house (T. 230; 1398)); that particles of certain explosives, which were never linked with Mr. Kiraly, were found in the trunk of Mr. Gallo's car; and that one Tim Thomas purported to identify Mr. Kiraly as a man he saw at the scene of the explosion shortly before it occurred.

Tim Thomas was the State's "key" witness. Yet the reliability of his identification of Mr. Kiraly was brought into serious question. Mr. Kiraly, a white male, has made a proffer that at an evidentiary hearing he could establish

that Mr. Thomas initially told the police it was TWO BLACK MALES that he saw at the scene of the explosion.

Further, because of Mr. Thomas' unfamiliarity with Mr. Kiraly and the great distance at which he claimed to have made the night identification, his ability to identify Mr. Kiraly was brought into serious question. His veracity was also challenged by his own statements to neighbors, the police, and a newspaper reporter that evening which contradicted his testimony at trial. Beyond this, the record of the new trial motion demonstrates the prosecutor suppressed evidence that Mr. Thomas' testimony might have been influenced by promises or expectations of leniency on outstanding warrants for theft and unlawful flight and that Mr. Thomas had a prior juvenile record.

Though at trial he denied knowing (T. 858, 873-874) and working for Mr. Greene (T. 858), in the new trial proceeding his uncle testified that Mr. Thomas claimed to have known Mr. Greene and to have worked for him (T. 1620-22; 1627-28; 1634; 1637). The latter testimony was corroborated by testimony in the new trial proceedings that Mr. Greene made to George Morgan.

The evidence before the jury set forth a number of other possible explanations for the explosion rather than the theory advanced by the State, including the possibility that because of his violent lifestyle someone else attempted to kill Mr. Greene or that Greene himself accidentally set off a bomb.

Mr. Kiraly not only disputed the State's evidence, but presented evidence indicating a status of health that was inconsistent with the professional "hit-man" that the State tried to claim he was. Mr. Kiraly had last worked a full ten years before this incident—in 1965 before having heart surgery (T. 1400). Since that time he was said to be "pretty sick all the time" (T. 1400) and on:

". . . 100% disability, I know that since I think, 1969 or 1970, he has had open heart surgery, several operations on his back, and a couple weeks ago, he had to go in for a bone cancer or something, something in reference to a bone condition" (T. 1399).

See also medical records, Exhibits C-1 through C-11.

Further, as part of his defense at trial, Mr. Kiraly presented the testimony of three witnesses establishing that he was at 5526 Richmond Road in Bedford Heights, Ohio a suburb on Cleveland's East Side, at the time of the explosion. The witnesses were in a better position to recall this specific day because May 11 was Mother's Day.

The jury returned guilty verdicts upon the two counts submitted to it. After Mr. Kiraly's trial, his co-indictee, Joseph Gallo, was tried upon the same offenses. The State's evidence against Mr. Gallo was substantially the same as that utilized to convict Mr. Kiraly.[1] What changed significantly between the Kiraly trial and the Gallo trial was the revelation of information to Mr. Gallo's counsel that had been suppressed in Mr. Kiraly's trial. This included the fact that the State's informant was a suspect in a gas station robbery and had been brought back to Ohio to testify in this case not, as represented by the prosecutor, under protective custody as a material witness but rather upon an arrest warrant for unlawful flight. With this

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1. There was one aspect of the State's case which purported to link each of the co-indictees to the crime which was not present in the other's case. In Mr. Gallo's case, scientific evidence was presented indicating that particles of explosives suspected of being used in the destruction of Mr. Greene's building were found in the trunk of the car operated by Mr. Gallo. Given the reliability of this quasi-objective evidence, the State's case may have been stronger against Mr. Gallo than against Mr. Kiraly. On the other hand, the State's informant, Tim Thomas, purported to identify Mr. Kiraly as being at the scene shortly before the explosion but was unable to positively identify Mr. Gallo.

added defense testimony before the jury, Mr. Gallo was acquitted.

It was this new testimony and later information suggesting that the State's witness claimed to have been an employee of Daniel Greene that provided the basis for Mr. Kiraly's first new trial motion. After an evidentiary hearing, the State Court denied the motion. Subsequently, Mr. Kiraly's counsel discovered additional evidence which suggested that perjury may have been committed by State witnesses in the trial and made a second new trial motion. This motion was denied without an evidentiary hearing.

The Ohio Court of Appeals overruled Mr. Kiraly's Nine Assignments of Error.[2] Mr. Kiraly next sought re-

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2. 1. The Court erred as a matter of law and to the prejudice of the Appellant in overruling the Appellant's *Motion to to Suppress Evidence* because the affidavit for the search warrant did not present a substantial basis for the Court to find that the information was credible.

2. The Court erred as a matter of law and to the prejudice of the Appellant in overruling the Appellant's *Motion to Suppress Evidence* because the affidavit upon which the warrant issued contained material false or misleading statements as a result of the affiant's failure to disclose how he obtained hearsay information.

3. The trial court erred as a matter of law and to the prejudice of the Appellant by not granting Appellant's *Motion for a Mistrial* due to or in the alternative for not instructing the jury to disregard the testimony as to Appellant's criminal reputation alleged when the Appellant did not testify on his own behalf.

4. The trial court erred as a matter of law and to the prejudice of the Appellant when it overruled Appellant's *Motion for Judgment* of Acquittal at the close of the State's case.

5. The trial court erred as a matter of law and to the prejudice of the Appellant in allowing the State's witness, Tim Thomas, to make an in-court identification of the Appellant, that he was not allowed to have the assistance of counsel at the lineup in which that witness identified Appellant.

(Continued on following page)

lief in the Ohio Supreme Court presenting Five Propositions of Law.[3] That Court denied both his appeal of

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Footnote continued—

6. The Court erred as a matter of law and to the prejudice of the Appellant by not granting Appellant's motion for a mistrial based on Appellant's objection to the prosecutor's closing argument.

7. The Court erred as a matter of law and to the prejudice of the Appellant by denying his motion for a new trial.

8. The trial court erred as a matter of law and to the prejudice of the Appellant by refusing to allow Appellant's counsel to contact and obtain statements from jurors as to the effect the newly discovered evidence would have had on them.

9. The trial court erred as a matter of law and to the prejudice of the Appellant by overruling Appellant's *Motion for Judgment* of Acquittal at the close of Appellant's case.

3. 1. A search warrant issued with reliance upon an officer's affidavit that information was supplied by unnamed, unproven informants and which affidavit contains false, misleading information is invalid, where, as here, evidence has been seized pursuant to such a warrant and used at trial, judgment must be reversed and a new trial had inasmuch as the accused's rights under Amendments IV, V, XIV, United States Constitution, have been violated.

2. Where the state has failed to prove each and every essential element of the offense charged beyond a reasonable doubt and where, as here, the defense has moved pursuant to Rule 29, O. R. Crim. P. to acquit both at close of the state's case and again at close of all evidence, judgment of conviction must be reversed with instructions to enter judgment of acquittal, for the failure of the state to prove guilt thereby constitutes a deprivation of the defendant's rights pursuant to Amendments V, XIV, U. S. Constitution.

3. The introduction of testimony relative to purported criminal conduct and associations of a putative defendant by police witnesses, endless comment by both witnesses and prosecutor as to the alleged criminal character of the accused, culminating in a rank and solely emotional appeal to the trial jury constitutes a denial of an accused's right to fundamental fairness, to due process of law, to a fair trial before an impartial jury, Amendments V, VI, XIV, U. S. Constitution.

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right and refused to grant his request that the record be certified.

On April 10, 1978, Mr. Kiraly, acting *pro se*, filed a Petition for Writ of Habeas Corpus raising five grounds for relief.[4] Subsequently, Petitioner obtained his present

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Footnote continued—

4. The deprivation of counsel at a post arrest lineup and resulting identification of the accused where, as here, counsel specifically asked to be present but was precluded from being present by the state, where only one identifying witness existed, and he previously identified another as the culprit, never gave a consistent description of the accused and never made any independent identification, where the defendant was utterly different in appearance from all others in the lineup, and which deprivation of counsel at the lineup was admitted to be erroneous by the trial judge and prosecutor, is offensive to the mandate of due process of law and to assistance of counsel, Amendments V, VI, XIV, U. S. Constitution.

5. Where the prosecutor possesses highly relevant information as to the character, deportment and conduct of its sole occurrence witness and deliberately withholds that information relating to the witness' prior arrest record, salient information as to employment and sources of income, and as to the disposition of criminal charges against its witness, the defense has made a case of prima facie merit in support of prosecutorial misconduct and bad faith. Where, as here, the trial court was presented with the facts pursuant to motions for new trial, Rule 33, O. R. Crim. P., denial of those motions must be reversed with instructions to grant a new trial, for the defendant's rights to due process of law and to a fair trial, Amendments V, XIV, U. S. Constitution, have been flagrantly denied.

4. 1. Petitioner's rights under Amendments IV, V, XIV, U. S. Constitution, were denied by use of evidence unlawfully seized pursuant to a defective search warrant.

2. The Petitioner's rights to due process of law, Amendments V, XIV, U. S. Constitution, were denied.

3. Petitioner's rights to fundamental fairness, to due process of law and to a fair trial before an impartial jury, Amendments V, VI, XIV, U. S. Constitution, were denied.

4. Petitioner's rights to due process of law and to the assistance of counsel, Amendments V, VI, XIV, U. S. Constitution, were denied.

5. Petitioner's rights to due process of law and to a fair trial before an impartial jury, Amendments V, VI, XIV, U. S. Constitution were denied.

counsel, who, with leave of the Court, amended his Petition to present 13 grounds for relief.[5] The record was

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5. 1. The State violated Petitioner's Fourteenth Amendment right to due process by failing to disclose the agreement or understanding that it had given leniency to two State's witnesses in return for their testimony against Petitioner at trial.

2. The State violated Petitioner's Fourteenth Amendment rights under the due process and privileges and immunities clauses by affirmatively misrepresenting that its key witness, Tim Thomas, was unavailable, that Thomas had turned himself over to the F.B.I., that he was in protective custody and that he had no record, when in fact Thomas had robbed a gas station, fled the state, was subsequently arrested for this theft charge and also had a prior juvenile record.

3. The State violated Petitioner's Fourteenth Amendment rights when it participated, by negligence or design, in the presentation of perjury to the jury including the following:

   a. That a dynamite box lid was initially in the alleged bombing car when, in fact, it was planted there afterward.

   b. That Daniel Greene did not know Tim Thomas, when, in fact, Thomas worked for Greene.

4. The State violated Petitioner's Fourteenth Amendment rights when it knowingly suppressed evidence material to guilt or innocence:

   a. The key witness identified individuals other than Petitioner shortly after the incident in question.

   b. That witnesses gave the police the license numbers or description of cars as being on the bombing scene, other than that of the car it claimed Petitioner was in the night of the bombing.

   c. Another important witness, Daniel Greene, was an F.B.I. or State informant.

   d. Daniel Greene selected the prosecutor and certain witnesses in Petitioner's trial.

5. The State violated Petitioner's Fourteenth Amendment right to due process when it denied his motion for new trial based upon testimony establishing the bias and interest on the part of the State's key witness, Tim Thomas, and which was suppressed at trial.

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supplemented by depositing portions of the transcript from the Gallo trial.

On February 22, 1982, the District Court issued its order dismissing the Petition for Writ of Habeas Corpus. Petitioner filed a Motion to Alter or Amend the Judgment which was denied on May 3, 1982.

The District Court denied Mr. Kiraly's Motion for a certificate of probable cause, but that motion was granted by the Court of Appeals in November of 1982. Nine issues

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Footnote continued—

6. The State violated Petitioner's rights to due process and an impartial jury because the prosecutor and several law enforcement agents, who were witnesses, made improper and inflammatory comments.

7. The State violated Petitioner's rights to due process and effective assistance of counsel by excluding Petitioner's attorney from being present at a line-up.

8. The State violated Petitioner's right to due process because the prosecution failed to prove the existence of each and every element of the offense charged beyond a reasonable doubt.

9. The State violated Petitioner's Fourteenth Amendment rights when it presented eyewitness testimony which the State knew, or should have known, was physically impossible.

10. The State violated Petitioner's Fourteenth Amendment due process rights by defining the State's burden of proof in such a manner as to allow conviction without a finding of guilt beyond a reasonable doubt.

11. The State violated Petitioner's Sixth and Fourteenth Amendment confrontation and cross-examination rights when it denied his counsel the opportunity to inspect written police reports containing summaries of witness Daniel Greene's prior Statement.

12. The State trial court denied Petitioner his rights under the Fifth and Fourteenth Amendments when it held that the prosecutor could impeach Petitioner with a conviction more than 25 years old.

13. The State violated Petitioner's Fourth and Fourteenth Amendment rights by introducing evidence unlawfully seized pursuant to a defective search warrant.

were presented for review in that Court.[6] Prior to oral

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6. I. The District Court erred in holding that Petitioner had to exhaust State remedies upon three of his claims.

II. The District Court erred in refusing to issue an Alternative Writ of Habeas Corpus requiring the State of Ohio to grant Appellant Kiraly an evidentiary hearing in a post-conviction proceeding; and failing, in the alternative, to vacate its prior order, direct Mr. Kiraly to exhaust his State remedies, but retain jurisdiction until such time as any existing State remedies were exhausted.

III. The District Court erred in failing to find that the State violated the Appellant's Fourteenth Amendment rights under the Due Process Clause by gross misconduct involving affirmative misrepresentations by the Prosecutor.

IV. The District Court erred in failing to find that the State violated Petitioner's Fourteenth Amendment rights when it participated, by negligence or design, in the presentation of perjury to the jury or in the alternative, failing to hold an evidentiary hearing upon that issue.

V. The District Court erred in failing to find that Petitioner was denied Due Process of Law as guaranteed by the Fourteenth Amendment by the State's failure to disclose the agreement or understanding it had to give leniency to a State's witnesses in return for his testimony against Petitioner at trial, or in the alternative, failing to hold an evidentiary hearing upon that issue.

VI. The District Court erred in failing to find that the State violated Petitioner's Fourteenth Amendment rights when it knowingly suppressed evidence material to guilt or innocence.

VII. The District Court erred in failing to find that the State violated Petitioner's rights to fundamental fairness, due process and an impartial Jury under the Sixth and Fourteenth Amendments by the actions of its Prosecutor and law enforcement witnesses in making improper comments.

VIII. The District Court erred in failing to find that the Petitioner's rights to Due Process of Law under the Fourteenth Amendment were denied when the prosecution failed to prove the existence of each and every essential element of the offense(s) charged and that Petitioner was guilty beyond a reasonable doubt.

IX. The Court erred in failing to find that the State violated Petitioner's Fourteenth Amendment right to Due Process when it denied his motion for a New Trial based upon evidence establishing the bias and interest on the part of the State's key witness, Tim Thomas, which was suppressed at trial, and the presentation of perjury to the Jury, and for failing to conduct an evidentiary hearing.

argument, the Circuit Court erroneously dismissed the case as moot. Upon a motion for reconsideration, the judgment was vacated and the case reinstated.

On December 7, 1983, the panel below issued a three-page opinion affirming the dismissal of Mr. Kiraly's habeas corpus petition upon the grounds that it was a "mixed" petition containing exhausted and unexhausted claims. Authority cited for this proposition was *Rose v. Lundy*, 455 U.S. 507 (1982).

REASONS FOR GRANTING THE WRIT

I. A FEDERAL DISTRICT COURT DOES NOT HAVE THE POWER TO GRANT A HABEAS CORPUS PETITIONER LEAVE TO AMEND HIS PETITION TO ADD UNEXHAUSTED CLAIMS TO A PETITION IN WHICH IT WAS CONCEDED THAT ONLY EXHAUSTED CLAIMS HAD BEEN RAISED.

Mr. Kiraly initially filed his habeas corpus petition with five separate claims. *See* fn. 3, *supra*. The District Court and Respondent's counsel indicated that all available state remedies had been exhausted on those claims. Without opposition from Respondent's counsel, the District Court granted leave to amend the habeas corpus petition to encompass a total of 13 claims. It would appear that it is one or more of the amended claims upon which the panel below indicates is unexhausted.

Mr. Kiraly submits that the Circuit Court has misapprehended the consequences that should result under *Rose v. Lundy*, 455 U.S. 507 (1982). *If* there are unexhausted claims, then the District Court was without power to grant the Motion for Leave to Amend. Thus,

rather than dismissing the entire Petition because it contained mixed claims, the Circuit Court should have overruled the District Court's order adding the unexhausted claims and reached the merits of the exhausted claims.

To be sure, this issue was not raised in the Circuit Court briefs by the party. Nevertheless, if the District is without power to entertain the mixed Petition, then the Circuit Court had no choice but to consider the issue and overrule the District Court judge's decision to improperly add the unexhausted claim(s).

No principle is more well established than that the Federal Courts have an obligation to insure that jurisdiction actually exists and that jurisdiction cannot be stipulated to by the parties. Accordingly, Mr. Kiraly would ask that this Court consider whether the applicability of *Rose v. Lundy* should prohibit the amending of habeas corpus petition to add unexhausted claims.

II. IN ORDER TO EXHAUST STATE REMEDIES, A PETITIONER MAY NOT BE REQUIRED TO FILE A THIRD NEW TRIAL MOTION WHICH THE STATE TRIAL JUDGE HAS ALREADY INDICATED WILL BE OVERRULED ON THE MERITS.

It was thought to be well established that the requirement to exhaust state remedies does not require a "futile" act or an "idle or useless effort." *E.g., Tatzel v. Hanlon*, 530 F.2d 1205, 1206 (5th Cir. 1976); *Lewis v. New Mexico*, 423 F.2d 1048, 1049 (10th Cir. 1970). In the case at bar, Mr. Kiraly has already been denied two previously filed new trial motions.

The trial court's second order made it unmistakably clear that the trial judge, to whom any new trial motion must be made, found that the Petitioner had failed to make the request showing that he came within the exception to

the 120-day requirement of Ohio Criminal Rule 33(B). The Court's first order denying the second new trial motion read:

> "Application for permission to file Affidavits in Support of Motion for New Trial, *granted*. Motion for New Trial, *overruled*." (Emphasis added) (App. A59)

The "Amended Journal Entry to Clarify the Entry of January 15, 1977" reads:

> "Upon showing of clear and convincing proof that the defendant was unavoidably prevented from the discovery of new evidence, the defendant's Motion for permission to file a Motion for a New Trial, (filed October 23, 1977), is granted.
>
> On the basis of the Affidavits contained in the Motion for a New Trial, (said Motion being filed within the seven day period of the granting of permission to file), the Motion for New Trial is overruled, in that the affidavits do not present evidence which warrants the granting of a New Trial." (App. A60)

Nevertheless, the Circuit below held that Mr. Kiraly should file an additional new trial motion in order to exhaust state remedies.[7] This Court should grant certiorari to determine whether the exhaustion requirement mandates pursuing remedies that are futile.

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7. The State Court of Appeals, in ruling upon Mr. Kiraly's motion for reconsideration, had suggested that his second new trial motion had been denied upon procedural, rather than substantive, grounds (App. A54-A58). This is a misreading of Judge Brown's initial order and prompted him to issue the amended order set forth above. The amended order demonstrates the futility of filing a third new trial motion. The Circuit below did not rely upon the State Court of Appeals' decision, nor did it discuss the effect of Judge Brown's new trial orders.

The Respondent argued that claims other than those presented by the second new trial motion had not been exhausted. The Circuit Court below did not identify which claims it deemed unexhausted.

III. A PETITIONER CANNOT BE SAID TO HAVE AS AN UNEXHAUSTED STATE REMEDY A THIRD NEW TRIAL MOTION WHEN SUCH A MOTION REQUIRES A SPECIFIC FACTUAL SHOWING THAT HE WAS UNAVOIDABLY DETAINED FROM FILING IT WITHIN 120 DAYS OF TRIAL WHEN NEITHER THE STATE NOR THE FEDERAL HABEAS COURTS IDENTIFY THE FACTUAL BASIS WHICH WOULD SUPPORT SUCH A CLAIM.

The Circuit did *not* indicate that Mr. Kiraly fell within the exception of Ohio Criminal Rule 33(B) and therefore was entitled to pursue relief through a new trial motion. Rather, all that Court indicated was that in *theory* a new trial motion could be made *if* a proper factual predicate was established: that it was proven by clear and convincing evidence that Mr. Kiraly was unavoidably detained from discovering the evidence upon which the new trial motion was based. Neither the Federal Courts nor the Respondent have at any time indicated what the factual basis of such claim could possibly be.

An analogy can be drawn to the use of a delayed appeal in the State of Ohio. It is certainly true that as a matter of *theory* a criminal defendant has the right to pursue a delayed appeal and must do so in order to exhaust state remedies. However, the factual predicate for exercising that right is that no direct appeal has ever been taken. *See generally Keener v. Ridenour*, 594 F.2d 581 (6th Cir. 1979), and *Collins v. Perini*, 594 F.2d 592 (6th Cir. 1979).

But, the courts are not permitted to hold since in theory there may be a remedy of delayed appeal, one must seek it first in order to prove that that remedy does not

exist. To the contrary, in order for a claim to be dismissed on the grounds that there is available state remedy, the Court must find the existence of the factual predicate: that no direct appeal has been taken.

Mr. Kiraly submits that the same process applies here. In order to properly find that he comes within the exception and can file a new trial motion, a Federal Court must find the existence of the factual predicate: that Mr. Kiraly was unavoidably detained in presenting this motion earlier.

The Court should grant leave in this case in order to consider whether the Federal Courts must articulate the factual basis for finding an unexhausted state remedy exists.

IV. THE RATIONALE OF ROSE V. LUNDY, 455 U.S. 507 (1982), SHOULD NOT BE EXTENDED TO APPLY TO A HABEAS CORPUS PETITIONER WHO, UNLIKE THE PETITIONER IN ROSE, IS NO LONGER IN CUSTODY AND HENCE CANNOT REFILE AN AMENDED PETITION.

This case presents a novel application of *Rose v. Lundy, supra*. *Rose v. Lundy* does not, by its own terms, apply to such cases as the one where the Petitioner's intervening release would prohibit him from refiling his petition because he can no longer meet the "in custody" requirement. This being the case, this Court is called upon to reach the question of whether *Rose v. Lundy* can be *extended* to apply a situation such as the one at bar or whether it should be limited to the facts and rationale as articulated in *Rose*.

It is not disputed that under the facts of *Rose* the District Court cannot entertain a petition which contains both exhausted and unexhausted claims. This Court

stated that dismissing "mixed petitions" would not impair the prisoner's interests in obtaining federal relief:

> "since he can *always amend* the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." *Rose v. Lundy*, 455 U.S. 509, 520 (1982) (emphasis added).

The Court seems to have contemplated that petitioners would be able to refile their petitions for habeas corpus without the unexhausted claims.

This Petitioner would not be able to refile his petition since he was released on parole on November 1, 1979, and completed his parole obligations on November 1, 1980. Since § 2254(b) requires a person to be in custody before he may file a habeas petition, dismissal of the petition effectively precludes him from federal relief.

That the harsh results that would incur to Mr. Kiraly by a mechanical application of the *Rose* case was not contemplated is suggested from the closing paragraph of the majority opinion:

> ". . . because a total exhaustion rule promotes comity and *does not unreasonably impair the prisoner's right to relief*, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 455 U.S. 509, 522 (1982) (emphasis added).

A prisoner's rights are not unreasonably impaired when his federal relief is merely delayed in favor of first allowing a state determination. Total abrogation of federal relief is an unreasonable impairment not to be counterbalanced by the interest of comity between the federal and state courts. *Rose* should therefore be limited to the cases where the petitioner has an opportunity to refile in federal court.

Given the different factual context, a different procedure should be fashioned. There are at least three alternatives. The least attractive is to allow Mr. Kiraly time in which to amend his petition—if he so desires—to delete the unexhausted claims. This procedure appears to have been adopted in post-*Rose* cases even where there appears to have been no bar to filing a new petition. *E.g.*, *Stewart v. Parratt*, 682 F.2d 757, 758 (8th Cir. 1982); *Hall v. State of Ohio*, 541 F. Supp. 295, 297 (S.D. Ohio 1982).

A second alternative would be to direct the District Court to retain jurisdiction until the State courts issued a ruling upon the issue of whether any state remedy is currently available to this Petitioner. But the most proper alternative would be to issue an alternative Writ of Habeas Corpus requiring the State to grant Mr. Kiraly an evidentiary hearing within 90 days after the filing of simultaneous motions for a new trial and post-conviction relief. If, as the Circuit Court hypothesizes, such a hearing is available under state law, then such an alternative writ would merely be redundant and would have no effect upon the actions of the state courts. On the other hand, if the District Court is mistaken, then use of the alternative writ would protect Mr. Kiraly's access to a forum in which to litigate his constitutional claims.

While Mr. Kiraly fully maintains that the better position is to limit *Rose* to its own basis, he nevertheless fully acknowledges that this Court has the power and the right to reach an opposite conclusion as long as it can support that conclusion by a rational articulation of reasons justifying the extension of *Rose*. Regretfully, the panel decision below failed to acknowledge this choice and acted as if *Rose* applied by its own force to the case at bar. Given the impact of this issue on habeas corpus, it is deserving of treatment by the Court.

CONCLUSION

All four issues presented by Petitioner Kiraly pertain to the doctrine of exhaustion of state remedies. Their resolution will have national impact in determining the consideration of such claims by the Federal District Courts. Consequently, Petitioner Kiraly suggests that these issues are worthy of the attention of the Court and requests that certiorari be granted.

Respectfully submitted,

RICHARD L. AYNES
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751
Counsel of Record for William Kiraly, Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 7, 1983)

No. 82-3723

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM KIRALY,
Petitioner-Appellant,

v.

CLARENCE CLARK, Chairman,
Respondent-Appellee.

BEFORE: KEITH, KENNEDY and JONES, *Circuit Judges.*

PER CURIAM This is an appeal from a district court decision which dismissed petitioner's writ of habeas corpus because it contained claims which had not been exhausted in the state court.

Petitioner was initially indicted by a Cuyahoga County Grand Jury for attempted aggravated murder, aggravated arson and conspiracy to commit aggravated murder. Following a jury trial, petitioner was found guilty of the latter two crimes and sentenced to five to twenty-five years imprisonment on each count, sentences to run concurrently.

Petitioner appealed his conviction to the Ohio Court of Appeals where the trial court's judgment was affirmed.

Appeal was subsequently sought in the Ohio Supreme Court, but that court declined review.

Thereafter, a petition for writ of habeas corpus was filed in United States District Court for the Northern District of Ohio. Petitioner amended his petition to contain several claims that had not been raised in the Ohio state courts. The district court issued an opinion dismissing the petition for failure to exhaust state judicial remedies. Petitioner later moved to alter or amend the district court judgment. The district court denied the motion to alter or amend and affirmed its earlier judgment [2] which dismissed petitioner's writ.

Petitioner appealed the district court judgment, after which he was released from prison on parole. Petitioner was granted a final release from parole while this appeal was still pending. For the reasons set forth below, we affirm the decision of the district court.

In dismissing the petitioner's habeas petition, the district court held that the review must be denied pursuant to *Rose v. Lundy*, 455 U.S. 507 (1982), where the Supreme Court held that a "mixed" petition containing exhausted and unexhausted claims must be dismissed.

Petitioner asserts that the district court erred because he has exhausted all available remedies in the Ohio courts. According to petitioner, further pursuits of his claims in the Ohio courts would be futile because the Ohio State Court of Appeals failed to grant his original motion for new trial. Petitioner further contends that his failure to present newly discovered evidence within the 120 days after verdict as required by Ohio Criminal Rule 33(B) precludes further review by the Ohio courts. That rule provides in pertinent part:

> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. *If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.* (Emphasis added).

The language of Ohio Criminal Rule 33(B) illustrates the error of petitioner contention. Petitioner may still seek a new trial after the one hundred twenty day limitation of Rule 33(B) if he can show by clear and convincing evidence that he was unavoidably prevented from the discovery of that evidence. Petitioner, however, chose not to pursue this available remedy, and instead sought habeas relief in the federal district court. However, petitioner had not exhausted his state remedies as required by [3] 28 U.S.C. §2254. Thus, the district court was correct in dismissing petitioner's habeas petition pursuant to *Rose v. Lundy, supra.*

Accordingly, we affirm the judgment of the Honorable John M. Manos of the United States District Court for the Northern District Court of Ohio dismissing the petition for writ of habeas corpus.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed May 3, 1982)

Case No. C78-398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM KIRALY,
Petitioner,

v.

CLARENCE CLARK, Chairman,
Respondent.

MEMORANDUM OF OPINION

On April 4, 1978, the petitioner, William Kiraly, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Attached to his petition was a motion to proceed *in forma pauperis*. 28 U.S.C. § 1915. On April 10, 1978, the court granted Kiraly leave to proceed *in forma pauperis* and ordered the Attorney General of the State of Ohio to certify the true cause of detention in accordance with 28 U.S.C. § 2243. On May 2, 1978, the Attorney General filed a return of writ. Between May, 1978, and June, 1980, Kiraly filed additional briefs and an amended petition with the assistance of counsel. The State of Ohio also filed supplemental returns of writ. On February 22, 1982, this court denied Kiraly's application for a writ of habeas corpus and dismissed the petition. On March 2, 1982,

Kiraly filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). For the reasons discussed below, Kiraly's Rule 59(e) motion is denied.

When Kiraly originally filed his habeas corpus petition, he was in the custody of Ted Engle, Superintendent of the Chillicothe Correctional Institution. On October 10, 1979, the Ohio Parole Authority granted him a parole effective November 1, 1979. Kiraly has completed the terms and conditions of the parole and now enjoys a full release.

Kiraly's petition alleged thirteen grounds for relief. After a careful examination of the record, this court held that Kiraly had not exhausted his state remedies on three of those claims. The court dismissed the other claims for relief on their merits.

[2] In his Rule 59(e) motion Kiraly requests the court to reconsider its rulings on several of the exhausted issues. As to the unexhausted claims, Kiraly does not specifically request this court to reconsider its ruling. However, Kiraly does submit that because it is "unclear whether he does in actuality, have a realistic hope of presenting his claims to the State Courts"[1] and because he is no longer in custody, he may not be able to seek federal habeas review if the state courts do not grant his motions.[2] Thus, he asks this court to:

> . . . issue an alternative Writ of Habeas Corpus requiring the State to grant [him] an evidentiary hearing—either on post-conviction or through the vehicle

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1. Kiraly's Motion to Alter or Amend the Judgment, p. 10.

2. "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed." *Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S. Ct. 1556, 1560 (1968).

of a new trial motion—within 90 days after the filing of a Motion for New Trial and a simultaneous Petition for Post-Conviction Relief in the Court of Common Pleas of Cuyahoga County.

OR

That this court vacate its prior order, direct [him] to exhaust his State remedies, and in the meantime retain jurisdiction over the case but stay all proceedings until any existing state remedies are exhausted.

In a very recent decision, *Rose v. Lundy*, ... U.S. ....., 102 S. Ct. 1198 (1982), the Supreme Court held: "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 102 S. Ct. at 1205. The Supreme Court was unequivocal in its adoption of a total exhaustion rule. When confronted with a habeas petition in which the petitioner presents both exhausted and unexhausted claims, the district court must dismiss the entire petition. The district court is not to decide the merits of exhausted claims or to retain unexhausted claims until the state courts have decided those claims.

Accordingly, the court denies Kiraly's motion to alter or amend the judgment.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 22, 1982)

Case No. C78-398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM KIRALY,
Petitioner,

v.

CLARENCE CLARK, Chairman
Respondent.

MEMORANDUM OF OPINION

On April 4, 1978 the petitioner, William Kiraly, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] Attached to his petition was a motion to proceed *in forma pauperis*. 28 U.S.C. § 1915. On April 10, 1978 the court granted Kiraly leave to proceed *in forma pauperis* and ordered the Attorney General of the State of Ohio to certify the true cause of detention in accordance with 28 U.S.C. § 2243. On May 2, 1978 the Attorney General filed a return of writ. On May 4, 1978 Kiraly filed a brief in support of his petition. On May 15, 1978 the Attorney

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1. At that time Kiraly was in the custody of Ted Engle, Superintendent of the Chillicothe Correctional Institution. On October 10, 1979 the Ohio Parole Authority granted him a parole effective November 1, 1979.

General filed a supplemental return of writ. On May 23 Kiraly filed a supplemental brief. On August 2, 1978 Richard Aynes filed notice that he would appear as counsel for Kiraly in all proceedings for this case. On January 29, 1979 Barton Craig also filed notice that would appear as co-counsel for Kiraly. On March 30, 1979 Kiraly moved for leave to amend his petition; this court granted that motion on April 19, 1979.

In his amended petition Kiraly alleges thirteen grounds for relief:

1. The State violated his Fourteenth Amendment right to due process by failing to disclose the agreement or understanding that it had given leniency to two State's witnesses in return for their testimony against Kiraly at trial.

2. The State violated Kiraly's Fourteenth Amendment rights under the due process and privileges and immunities clauses by affirmatively misrepresenting that its key witness, Tim Thomas, was unavailable, that Thomas had turned himself over to the F.B.I., that he was in protective custody and that he had no record, when in fact Thomas had robbed a gas station, fled the state, was subsequently arrested for this theft charge and also had a prior juvenile record.

[2] 3. The State violated Kiraly's Fourteenth Amendment rights when it participated, by negligence or design, in the presentation of perjury to the jury including the following:

a. That a dynamite box lid was initially in the alleged bombing car when, in fact, it was planted there afterward.

b. That Daniel Greene did not know Tim Thomas, when, in fact, Thomas worked for Greene.

4. The State violated Kiraly's Fourteenth Amendment rights when it knowingly suppressed evidence material to guilt or innocence:

a. The key witness identified individuals other than Kiraly shortly after the incident in question.

b. That witnesses gave the police the license numbers or description of cars as being on the bombing scene, other than that of the car it claimed Kiraly was in the night of the bombing.

c. Another important witness, Daniel Greene, was a F.B.I. or State informant.

d. Daniel Greene selected the prosecutor and certain witnesses in Kiraly's trial.

5. The State violated Kiraly's Fourteenth Amendment right to due process when it denied his motion for new trial based upon testimony establishing the bias and interest on the part of the State's key witness, Tim Thomas, and which was suppressed at trial.

6. The State violated Kiraly's rights to due process and an impartial jury because the prosecutor and several law enforcement agents, who were witnesses, made improper and inflammatory comments.

7. The State violated Kiraly's rights to due process and effective assistance of counsel by excluding Kiraly's attorney from being present at a line-up.

8. The State violated Kiraly's right to due process because the prosecution failed to prove the existence of each and every element of the offense charged beyond a reasonable doubt.

9. The state violated Kiraly's Fourteenth Amendment rights when it presented eyewitness testimony which the

State knew, or should have known, was physically impossible.

[3] 10. The State violated Kiraly's Fourteenth Amendment due process rights by defining the State's burden of proof in such a manner as to allow conviction without a finding of guilt beyond a reasonable doubt.

11. The State violated Kiraly's Sixth and Fourteenth Amendments confrontation and cross-examination rights when it denied his counsel the opportunity to inspect written police reports containing summaries of witness Daniel Greene's prior Statement.

12. The State trial court denied Kiraly his rights under the Fifth and Fourteenth Amendments when it held that the prosecutor could impeach Kiraly with a conviction more than 25 years old.

13. The State violated Kiraly's Fourth and Fourteenth Amendment rights by introducing evidence unlawfully seized pursuant to a defective search warrant.

On December 10, 1979 the Attorney General filed a supplemental return of writ. On February 1, 1980 Kiraly filed a brief in opposition to the State's most recent return of writ. On June 30, 1980 Kiraly moved to amend his petition by substituting Clarence W. Clark, Chairman of the Ohio Adult Parole Authority for Ted Engle, Superintendent of the Chillicothe Correctional Institute. The court grants this motion to amend.

For the reasons discussed below, Kiraly's petition for a writ of habeas corpus is denied.

I.

At approximately 3:30 a.m. on the morning of May 12, 1975, an explosion destroyed Daniel Greene's house. The explosion was caused by the detonation of four or five

pounds of tetrytol, a substance which is not available to the general public through lawful means. Tim Thomas, a resident of the neighborhood, who could not sleep that night was strolling the streets. Shortly before the explosion he observed a green Oldsmobile and then saw a man walk behind Greene's house. Greene survived the blast.

[4] Later the same day the police secured a warrant to search Kiraly's 1969 black Cadillac and a 1974 green Oldsmobile owned by Joseph Gallo. The affidavit, which supported the request for the search warrant, averred that both Kiraly and Gallo had extensive police records, that both men had dealings with recent victims of gangland slayings and that a note removed from the automobile of one of the victims indicated that Daniel Greene was under surveillance. The affidavit further averred that Gallo was leasing a green Oldsmobile with license plate number EL 805 and that this automobile or a car bearing this license number had been seen by informants in Daniel Greene's neighborhood: On May 7, 1975 Greene saw a green Buick with license plate number EL 805 drive near his house. On May 9, 1975 another informant saw a black Cadillac with license number EL 805 driving around the vicinity of Green's house. On May 11, 1975 a second informant observed a black Cadillac with license number EL 805 stop near a tavern, just several doors from Greene's house. Finally the affidavit averred that the FBI had both Kiraly and Gallo under surveillance and that the FBI had observed them together in both the Cadillac and the Oldsmobile. The search of Gallo's Oldsmobile discovered part of box for blasting caps and a yellow powder, which laboratory tests later revealed to be tetrytol. Arrest warrants for Kiraly and Gallo were then issued.

On June 10, 1975 when Kiraly learned that an arrest warrant had been issued for him, he secured a lawyer, Mr.

Ralph Sperli. Kiraly intended to meet his attorney and then with his attorney go to the police station where he would surrender himself. But the police arrested Kiraly before he was able to meet his attorney. Later that day Kiraly was released on bond.

On June 11, 1975 the police arranged for a line-up to determine if Thomas could identify Kiraly as the man he saw behind Greene's house the morning of the explosion. Before Thomas was taken to view the line-up, the police showed him approximately twenty-five photographs. Thomas recognized Kiraly, but did not say anything because he wanted to see the line-up. Sperli brought Kiraly to the police station for the line-up. The police asked Sperli to step into another room while they arranged the line-up and brought up the witness. [5] Five other men, the same size and hair color as Kiraly, were used to compose the line-up. When Thomas was brought in, he was told: "He may be there, he may not. Give us a yes or no. If you do not see the man, say no." Thomas identified Kiraly as the man he saw that night. Thomas said he was so sure of the identification that his hands were shaking. However, Sperli was never called into the room and thus did not see the line-up. The prosecutor insists that this was due solely to confusion and inadvertence.

On June 12, 1975 the grand jury of Cuyahoga County, Ohio indicted Kiraly and Gallo on one count of attempted aggravated murder in violation of OHIO REV. CODE ANN. §§ 2903.01 and 2923.02 (Page 1975);[2] one count of aggra-

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2. OHIO REV. CODE ANN. § 2903.01 (Page 1975), provides:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while

(Continued on following page)

vated [6] arson in violation of OHIO REV. CODE ANN § 2909.02 (Page 1975);[3] and one count of conspiracy to com-

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Footnote continued—

fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

OHIO REV. CODE ANN. § 2923.02 provides:

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

3. OHIO REV. CODE ANN. 2902.02 provides:

(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;

(2) Cause physical harm to any occupied structure.

(B) Whoever violates this section is guilty of aggravated arson, a felony of the first degree.

mit aggravated murder in violation of OHIO REV. CODE ANN. § 2923.01 (Page 1975).[4]

Kiraly's trial began on November 13, 1975.[5] Before opening arguments were made to the jury Kiraly's counsel moved to suppress the evidence seized from Gallo's car, the tetrytol and the blasting cap box, on the grounds that the supporting affidavit was insufficient to establish probable cause. Sperli submitted a brief in support of this motion. The trial judge also listened to thorough oral arguments from both defense and State counsels. After considering the oral arguments and reviewing the brief and the cases cited therein, the trial court denied the motion to suppress.

[7] Sperli also made a motion in limine to prevent the prosecutor from impeaching Kiraly, if he took the stand,

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4. OHIO REV. CODE ANN. 2923.01 provides in pertinent part:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any such offense;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.
>
> (B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed.

The trial judge later dismissed the attempted aggravated murder count as being duplicative.

5. At this time Gallo had not yet been arrested.

on the basis of a 1969 conviction for assault on a federal officer and a thirty-six year old conviction for armed robbery. Sperli argued that if the prosecutor would be allowed to impeach Kiraly on these convictions, he would have to advise Kiraly not to testify.[6] The trial court ruled that if Kiraly took the stand, the prosecutor would be able to inquire: "Were you arrested and convicted of a state or federal offense?", but the prosecutor could not examine on the detail or circumstances. The answers would "go strictly to the credibility."[7] Kiraly did not take the stand. During opening statements the prosecutor remarked that Kiraly was known as "Mo the Mechanic," a hit man who made bombs.

At trial Greene testified that on May 9 and 11, 1975 he saw Kiraly and Gallo drive slowly by his house in a green Oldsmobile with license number EL 805. Greene also testified about his actions in his house immediately preceding and following the blast. Kevin McTaggert, a distant cousin of Greene, testified that on May 6, 1975 at approximately 10:30 p.m. he saw a 1974 green Oldsmobile with license number EL 805 drive by Greene's house at five miles an hour. Two men were in the car and the car's lights were not on. McTaggert also testified that he had seen Kiraly drive past Greene's house on five or six different prior occasions.

Special FBI agents, who were assigned to investigate organized crime, testified that Kiraly and Gallo had been under surveillance and that on May 6 and 7, 1975, the two were seen together in a green Oldsmobile which bore license number EL 805. One of the agents also stated

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6. Kiraly put on evidence of an alibi, and Sperli believed that Kiraly's testimony in support of the alibi would be helpful to the case.

7. Trial transcript, p. 1420.

that Kiraly was known as Mo the Mechanic, but the trial judge did not permit the agent to testify what mechanic meant. An expert identified the yellow powder taken from Gallo's car as tetrytol and that a bomb made of that substance caused the explosion.

[8] Pursuant to *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967), before Thomas was permitted to identify Kiraly before the jury, a voir dire was conducted to determine if Thomas could identify Kiraly in court based upon observations other than the line-up identification. Thomas testified that at approximately 3:00 a.m. on May 12, 1975 he was walking the streets because he could not sleep.[8] He saw a green Oldsmobile with two men in it pass by Greene's house. Shortly after that he saw Kiraly, apparently carrying something under his arm, walk behind Greene's house. He saw Kiraly between six to ten seconds. Kiraly was looking in his direction, and Thomas was trying to discern if the individual was anyone he knew.[9] The prior facts about the line-up were also discussed. The trial judge ruled that except for the absence of counsel, the line-up was not improper. After considering the factors enunciated by the Supreme Court in *Wade*, the trial judge held Thomas could make an in-court identification of Kiraly but that any testimony in reference to the line-up would not be permitted.

As part of the defense's case, William Feller, a surveyor, testified that given the positions of Thomas, the buildings, the street, and certain cars parked behind Greene's house, it would have been impossible for Thomas to have seen Kiraly. Feller also testified about inaccura-

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8. At that time Thomas worked a night shift and that night he had off.

9. Thomas stated that if the person would have been someone he knew, he would have started a conversation.

cies in the State's diagram of the area. The prosecution extensively and rigorously cross-examined Feller.

During closing argument the prosecutor referred to Kiraly as Mo the Mechanic, a professional hit man, a member of organized crime and an indiscriminate killer. Twice the judge sustained objections to such remarks.

After the trial judge had instructed the jury, Kiraly's counsel objected to the charge only on two grounds: the wording of the arson charge and the giving of an instruction that no inference was to be taken from the fact that Kiraly did not testify.

On November 28, 1975 the jury found Kiraly guilty of aggravated arson and conspiracy to commit aggravated murder.

[9] In January, 1976 Kiraly moved for a new trial on the grounds that new evidence had been discovered. On January 23, 1976 the trial court held a hearing on this motion. One of Thomas' uncles testified that shortly before the trial Thomas came to his house to pick up a pair of pants for the court appearance. While there Thomas disclosed to the uncle that Thomas was going to be taken care of by Danny Greene. After the trial the uncle saw Thomas privately several times. On those occasions Thomas revealed that when he has drinks with Greene, Greene pats him on the back and says he is a nice guy, that he was working for Greene and that he has done two favors for Greene, one of which was an out-and-out lie. However, at no time did Thomas say that Greene was paying him for his testimony or that he lied in court. These conversations were in private between Thomas and his uncle; there is no evidence to indicate that the State knew about the conversation. Thomas' stepfather also testified that on the weekend following the explosion

Thomas told him that Thomas wanted to work for Greene. Again there is no evidence that the State knew of his conversation.

Finally at the hearing on the motion for a new trial, Raymond Sacifini, the general overseer of the Gulf gas station where Thomas worked in the summer of 1975, testified that on July 15 Thomas quit without notice or explanation. On July 16 Sacifini discovered $1600 missing. Warrants for Thomas' arrest were issued and he was eventually found in Florida. However, Sacifini further testified that he didn't know who took the money and that no one was ever convicted for the theft. After listening to all the evidence the trial judge denied the motion for a new trial.

On January 24, 1977 Kiraly filed a second motion for a new trial based on new evidence. Kiraly supported the motion with the affidavit of George Morgan and excerpts of Edward Bobey's testimony at Gallo's trial. Morgan's affidavit averred: George Morgan knew Greene on a friendly basis for fourteen or fifteen years. Greene told Morgan that Kiraly and Gallo were friends of a person he disliked very much. Greene further told Morgan that Greene was framing Kiraly and Gallo for the explosion and that he had something put in Gallo's car. Greene had connections with the Cleveland Police Department. [10] Finally Greene revealed he had some witnesses in the palm of his hand, and that one was an ex-marine, who was being paid to testify.[10] Bobey, a police officer, inventoried Gallo's car, after it had been impounded pursuant to the search warrant. But he did not inventory the blasting cap box, nor could he even recall seeing such a box in the car. On January 25, 1977 the trial court denied Kiraly's second motion for a new trial.

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10. Thomas had been in the Marine Corps.

Kiraly appealed his conviction to the Court of Appeals of Cuyahoga County. On October 21, 1977 in upholding the guilty verdict the court ruled: The evidence supported the jury's finding of guilt. The warrant to search the automobile was proper because the underlying affidavit was sufficient to support a finding of probable cause. The admission into evidence that the FBI unit, which investigates organized crime, had Kiraly and Gallo under surveillance and that Kiraly was known as Mo the Mechanic was not so suggestive of criminal reputation as to constitute prejudicial error. Similarly the prosecutor's remarks that Kiraly was a hit man were not so prejudicial as to deny Kiraly a fair trial. The trial court correctly applied the *Wade* decision in permitting the in-court identification. The trial court correctly denied the first motion for a new trial.

Kiraly also appealed the denial of his second motion for a new trial. The Court of Appeals dismissed the argument on procedural grounds. Ohio Criminal Rule 33(B) requires that a motion for new trial on account of newly discovered evidence shall be filed within 120 days after the verdict was rendered. After that time "such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the 120 day period." For the second motion for a new trial, the trial court never issued an order finding that Kiraly was unavoidably prevented from finding the new evidence within the 120-day period. Accordingly the Court of Appeals held the sufficiency of the materials submitted to the trial court "could not be decided by either the trial court or this court. [11] Thus, whether the evidence contained in the affidavit warranted a new trial, was not before the court. Inasmuch as there is no time limit provided for in Criminal Rule 33,

[Kiraly] is not precluded from complying with its provisions requiring a trial court finding that he was unavoidably prevented from discovering the new evidence within the 120 day period."

On March 30, 1978 the Supreme Court of Ohio denied Kiraly's motion for appeal.

II.

Kiraly's first claim, that the State failed to disclose agreements of leniency it had with two of its witnesses, and his fourth claim, that the State suppressed Thomas' original identification statement, descriptions of other cars in the area of the explosion and Greene's status as an informant and improper participation in the trial, are denied because Kiraly has not exhausted his State remedies.

The federal habeas corpus statute, 28 U.S.C. § 2254(b) and (c), requires that a petitioner for habeas corpus relief must exhaust all available state remedies before seeking relief in the federal courts:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The concerns of federalism mandate this requirement. *Keener v. Ridenour*, 594 F.2d 581, 584 (6th Cir. 1979).

The issues presented in the first and fourth claims were never presented at trial, in a motion for new trial or to the Court of Appeals. Furthermore, a resolution of these claims depends upon factual allegations which cannot be determined by examination of the files and records of the case.

[12] Accordingly, Kiraly can present the issues to the courts of Ohio by a motion for new trial on account of new evidence, Ohio Rule of Criminal Procedure 33 or by Ohio's post-conviction relief statute, OHIO REV. CODE ANN. § 2953.21 (Page 1975).[12]

Subsection (a) of section 2953.21 only permits post-conviction relief to "persons convicted of a criminal offense" who claim that "there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." In *State v. Milanovich*, 42 Ohio St. 2d 46, 235 N.E.2d 540 (1975), the Ohio Supreme Court elaborated on the concept of what is a voidable judgment:

> Where a claim raised by a petitioner for post-conviction relief under R.C. 2953.21 is sufficient on its face to raise an issue that petitioner's conviction is void or voidable on constitutional grounds, and the claim is one which depends upon factual allegations that cannot be determined by examination of the files and records of the case, the petition states a substantial ground for relief. Syllabus 1 of the Opinion.

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12. The Sixth Circuit in *Steed v. Salisbury*, 459 F.2d 475 (6th Cir. 1972) held Ohio's post-conviction relief statute is a remedy which a petitioner must exhaust before habeas relief is available to him.

Similarly Kiraly has not exhausted claim three (a) that the State by introducing the blasting cap box into evidence participated in perjury because the box was actually planted in Gallo's car. Although Kiraly did present this matter to the trial court in a motion for a new trial, the Court of Appeals specifically held that because a procedural requirement of Ohio Criminal Rule 33 had not been fulfilled, the trial court "could not" decide the motion on its merits. The Court of Appeals further held that because Rule 33 has no time limit, Kiraly could seek redress at the trial court.

Kiraly's arguments that the State cannot assert exhaustion because of waiver or estoppel are not persuasive. The state admitted that Kiraly had exhausted his state remedies for the claims he asserted in his initial petition. However, these claims were not in the initial petition. [13] In *Keener, supra,* the Sixth Circuit held that "the doctrine of exhaustion . . . reflects a policy of comity between state and federal courts, an accommodation of our federal system . . ." 594 F.2d at 584. Thus, federalism demands that the State have the "initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Id.* Therefore, this court holds that Kiraly has not exhausted claims one, three (a), and four.

Kiraly's second claim is that the state deprived him of his Fourteenth Amendment right to due process because it withheld information and made affirmative misrepresentations about one of its witnesses, Tim Thomas: Although the State maintained that Thomas was of good character and was unavailable for some inexplicable reason, the State knew that he had robbed his employer and was being held in custody in Florida after he had fled Ohio.

In a series of cases, the United States Supreme Court has established the standards to determine what pros-

ecutorial misconduct results in a constitutional deprivation of due process. The court has held "that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[13] *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976). In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) the Court ruled "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196. In *Agurs, supra*, the Court crystalized its decisions by holding that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 96 S. Ct. at 2400. Very recently the Court reiterated this holding in *Smith v. Phillip*, ... U.S. ....., ... S. Ct. ....., 50 LW 4190 (1982): "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." 50 LW at 4193.

[14] In the instant case the prosecutor's failure to disclose Thomas' possible involvement in the theft of the Gulf station did not make Kiraly's trial fundamentally unfair. Thomas was not convicted of theft. In fact according to Sacifini's testimony Thomas was never charged with the theft and no one ever convicted of the theft. Thomas'

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13. *Plye v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L.Ed. 214 (1942); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L.Ed.2d 9 (1957); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959); *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L.Ed.2d 690 (1967); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 273, 38 L.Ed.2d 216 (1973).

arrest warrants would not have been admissible at Kiraly's trial. *United States v. Pennix*, 313 F.2d 524 (4th Cir. 1963).[14] Accordingly Kiraly's second claim is denied.

Kiraly's claim three (b) asserts that the State by presenting evidence, that Greene did not know Thomas, participated in perjury because in fact Thomas worked for Greene. The Supreme Court has consistently held that the prosecutor's knowledge of the perjured testimony is a prerequisite to a constitutional deprivation. In *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340 (1935) the Court held that due process has been violated if the prosecution's case includes perjured testimony and that "the prosecution knew or should have known of the perjury." See also, *Agurs, supra*, and the cases cited in footnote 13.

In the instant case there is no evidence that the prosecution knew or should have known that Thomas was working for Greene. Kiraly relies on the testimony of Thomas' uncle and stepfather to show that Thomas was working for Greene. These conversations were held in private between Thomas and the respective parties. In fact the conversation Thomas had with his uncle, in which Thomas revealed that he was being taken care of by Greene, occurred in the uncle's bedroom. Accordingly this court denies Kiraly relief on claim three (b).

Kiraly alleges in his fifth claim that his due process rights were violated when the State courts denied his motion for a new trial based upon testimony establishing bias

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14. Kiraly's petition also alleges that the State also withheld Thomas' juvenile record. However there is no evidence before the court that Thomas has a juvenile record. In any event the failure to disclose the juvenile record did not deprive Kiraly of a fair trial. "Evidence of juvenile adjudications is generally not admissible. . . ." Admission of a juvenile conviction for purposes of impeachment is left to the discretion of the trial judge. Federal Rule of Evidence 609.

and interest on the part of Thomas, which was suppressed. [15] Again Kiraly relies on the testimony of Thomas' stepfather and uncle to establish bias and interest. To the extent that the claim contends that Kiraly's due process rights were violated because the prosecution suppressed evidence, the claim is denied. There is no evidence that the prosecution knew or should have known of such testimony. *Mooney, supra; Agurs, supra.* To the extent that the claim contends Kiraly's due process rights were violated because his motion for a new trial was denied, the claim is also denied. Subsection (d) of the federal habeas corpus act provides that if the petitioner has received a full, fair and adequate hearing on the merits in a state court proceeding, the determination of a factual issue by the state court shall be presumed to be correct and the burden shall rest upon the petitioner to establish by convincing evidence that the factual determination by the state court was erroneous.

In *Sumner v. Mata,* 449 U.S. 539, 101 S. Ct. 764 (1981), the state court of appeals and the federal district court held that the pretrial photographic identification employed by the police did not violate the petitioner's constitutional rights. The federal court of appeals reversed and held that the procedure was violative of the Constitution. The United States Supreme Court reversed and held the hearing by the state court of appeals was presumed to be correct pursuant to 28 U.S.C. § 2254(d) and that the petitioner had not overcome the presumption. In *Poole v. Perini,* 659 F.2d 730 (6th Cir. 1981) the Sixth Circuit held that the state courts in denying the petitioner's claim for relief on ineffective assistance of counsel had given the petitioner a full, fair and adequate hearing. Pursuant to section 2254 this hearing was presumed to be correct. The court further held that the petitioner had not overcome the presumption and concluded that therefore the federal courts may not

"substitute its review of the record for the determination by the state court." *Id.* at 736.

In the instant case Kiraly received a full, fair and adequate hearing on his motion for new trial at both the State trial court and the State appellate court. Kiraly has not presented any new evidence to establish that the State determination was erroneous. Thus, Kiraly's fifth claim is denied. **[16]** In any event, the denial of the motion for a new trial, based on the evidence presented at the hearing, was not constitutional error.[15]

Kiraly's sixth claim contends that his due process rights were violated because the prosecutor introduced inflammatory evidence and made improper remarks during opening and closing arguments: Kiraly, also known as Mo the Mechanic, is a hit man. The standard to be used in determining if a prosecutor's argument violates the Fourteenth Amendment is whether the prosecutorial argument is so egregious so as to render the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974) and *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979), *cert. denied*, 444 U.S. 936 (1979). In applying this standard the court must evaluate the remarks in the context of the entire trial: "whether the remarks have a tendency to mislead the jury, whether they are isolated or extensive, whether they were deliberately or accidently placed before the jury and the strength of the competent proofs introduced to establish the guilt of the accused." *Cook, Id.* at 120; and *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976).

The remarks made by the prosecutor were few in an extensive trial. The trial judge twice sustained objections

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15. Because of the State court of appeals' ruling on the second motion for a new trial, Kiraly has not exhausted his state remedies as to Morgan's affidavit.

to such remarks, and the remarks were such that the jury would not be misled. Moreover, Kiraly fully presented this issue to the state appellate court and was denied relief. That determination is presumed to be correct and Kiraly has not offered new evidence to rebut that presumption. 28 U.S.C. § 2254(d); *Sumner, supra;* and *Poole, supra.* Accordingly Kiraly's sixth claim is without merit.

Kiraly's seventh claim argues that because his counsel was prevented from being present at the line-up identification, Thomas' in-court identification of Kiraly was irreparably tainted and the trial court erred in permitting the in-court identification.

[17] In *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926 (1967) and *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951 (1967) the Supreme Court established that an accused has a constitutional right to have his counsel present at a line-up once prosecution has been initiated. Failure to have counsel present at the line-up precludes the State from introducing any evidence of the line-up identification. However, failure to have counsel present at the line-up does not automatically preclude an in-court identification. An in-court identification is permitted if the prosecution can "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the line-up identification." *Wade,* 388 U.S. at 240, 87 S. Ct. at 1939. *Holland v. Perini,* 512 F.2d 99, 102 (6th Cir. 1975), *cert. denied,* 423 U.S. 434 (1975). In applying this standard the court must consider the totality of the circumstances surrounding the identifications, including the opportunity the witness had to view the defendant at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the defendant, the level of certainty demonstrated by the witness at the confronta-

tion, the length of time between the crime and the confrontation and the suggestiveness of the line-up. *Wade, supra. Webb v. Havener*, 549 F.2d 1081 (6th Cir. 1971), *cert. denied*, 434 U.S. 873 (1977); *United States v. Rowan*, 518 F.2d 685 (6th Cir. 1975), *cert. denied*, 423 U.S. 949 (1975).

In the instant case sufficient independent basis existed to permit the in-court identification. Thomas looked directly at the individual's face for six to ten seconds. Thomas had an intense degree of attention. Only a month passed between the identification and the explosion. He was very certain that Kiraly was the individual, and the line-up was not impermissibly suggestive. Moreover, Kiraly was afforded a full, fair and adequate hearing on this issue in the state courts. The determination, that the in-court identification was proper, is presumed to be correct and Kiraly has not rebutted that presumption. 28 U.S.C. § 2254(d). *Sumner, supra;* and *Poole, supra.*

[18] Kiraly's eighth claim, that there was insufficient evidence to convict him, is also without merit. In *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979), the Supreme Court established the standard for sufficiency of evidence questions in habeas corpus proceedings: "After viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 99 S. Ct. at 2797. The evidence presented at trial as reflected by the record would allow any rational trier of fact to find guilt beyond a reasonable doubt. Various witnesses saw Gallo and Kiraly together in a 1974 green Oldsmobile with license number EL 805, driving slowly by Greene's house, in the week preceding the explosion. FBI agents also observed Gallo and Kiraly together in the same car. Shortly before the explosion Thomas saw two men in a

green Oldsmobile. He then saw Kiraly, apparently carrying something, walk behind Greene's house. A bomb made of four or five pounds of tetrytol, a substance not legally available to the general public, completely destroyed Greene's house. Tetrytol was found in Gallo's car the day of the explosion.

Kiraly's ninth claim argues that the State presented eyewitness testimony which it knew or should have known was physically impossible, and thus the State presented perjured evidence to the jury. To support this argument Kiraly relies on the testimony of his expert witness, William Feller, the surveyor. At trial Feller gave his opinion that given the position of the objects in the neighborhood, Thomas could not have seen a man, the size of Kiraly walking behind Greene's house. Although Kiraly phrases this argument in terms of presenting perjured testimony, the argument really is a mere rephrasing of the sufficiency of evidence argument. Kiraly admits this himself on page seventeen of his brief in opposition filed February 1, 1980. The jury heard all the testimony and was best able to weigh the evidence and the credibility of the witnesses. Accordingly, the court denies Kiraly's ninth claim for the same reasons it denied his eighth claim.

[19] Kiraly's tenth claim, that the trial court defined the State's burden of proof in such a manner as to allow conviction without a finding of guilt beyond a reasonable doubt, is without merit. Ohio Criminal Rule 30 provides in pertinent part:

> A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be

given to make the objection out of the hearing of the jury.

At trial Kiraly's counsel did not object to any part of the instruction on the burden of proof. In *Wainwright v. Sikes*, 433 U.S. 72, 97 S. Ct. 2497 (1977), the Supreme Court held absent a showing of "cause" and "prejudice," a petitioner may not raise in a habeas corpus petition a claim which he did not raise at the trial court and on which the state imposed a contemporaneous objection rule.

Kiraly's eleventh claim, that his Fourteenth and Sixth Amendment rights to cross-examination were violated because his counsel was denied the opportunity to inspect the police's summary of Greene's prior statement, is also meritless. This allegation is conclusory in nature and devoid of any sufficient factual substantiation. The "recitation of standard claims and stock phrases will not be regarded an adequate claim for habeas corpus relief." *Bernier v. Moore*, 441 F.2d 395, 396 (1st Cir. 1971); *United States v. Jones*, 614 F.2d 80 (5th Cir. 1980), *cert denied*, 446 U.S. 945 (1980); and *Gray v. Wingo*, 391 F.2d 268 (6th Cir. 1967). See also: *Agurs, supra;* and *Phillips, supra.*

Kiraly's twelfth claim is that the trial court denied him his rights under the Fifth and Fourteenth Amendments by ruling that if Kiraly testified, the prosecutor could impeach him with a conviction that was thirty-six years old. This is a state evidentiary matter. In *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976), and *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975), the Sixth Circuit held that state court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding unless it impugns fundamental fairness. See also: *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978); *Dinkins v. Wainwright*, 451 F.2d 587 (5th

Cir. 1970); and *Matha v. Swenson*, 449 F.2d 175 (8th Cir. 1971). After reviewing the record, this court holds that the trial court's ruling did not impugn fundamental fairness.

[20] Kiraly's final claim is that his rights under the Fourth and Fourteenth Amendments were violated because evidence, seized on the basis of a defective search warrant, was introduced at trial. Although Kiraly asserts that the trial court refused to allow a full and proper hearing on his motion to suppress, a review of the record reveals that the trial court heard all of the arguments on the motion to suppress as well as examined the brief Kiraly submitted to the court on the matter. In *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976), the Supreme Court held "that where the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 482, 96 S. Ct. at 3046.

Accordingly, the petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Decided October 21, 1977)

IN THE COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

STATE OF OHIO,
Appellee,

vs.

WILLIAM KIRALY,
Appellant.

[56 Ohio App. 2d 37]

Criminal procedure—Search and seizure—Contents of affidavit for search warrants—Right to counsel—Does not apply, when—Defendant not charged or indicted—Applicable, when—Crim. R. 33(B).

1. Search warrants may issue only upon a showing of probable cause. To conclude that a reasonable inference of probable cause was drawn by the magistrate, the affidavit must set forth sufficient underlying circumstances to support the inference of probable cause. Where the affidavit relies on information supplied by an informant, there must be a basis on which to conclude that the supplied information is credible.

2. The Sixth Amendment right to counsel at post-indictment confrontations does not apply to confrontations conducted before the defendant has been indicted or otherwise formally charged relative to the crime

in question. *State v. Sheardon* (1972), 31 Ohio St. 2d 20, following *Kirby v. Illinois* (1972), 406 U. S. 682.

However, where the record discloses that an arrest warrant has been issued and returned and that bond has been set for the crime charged in the arrest warrant, the accused has been "formally charged" and is entitled to counsel at confrontations held subsequent to the arrest and setting of bond, though he has not yet been indicted.

3. Criminal Rule 33(B) requires that when a motion for new trial on account of newly discovered evidence is not filed within one hundred twenty days after the day upon which the verdict was rendered, that "such motion *shall* be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." (Emphasis added). Where a [38] motion for new trial on account of newly discovered evidence does not comply with the requirements of this section, that motion should be dismissed.

(No. 36008—Decided October 21, 1977.)

APPEAL: Court of Appeals for Cuyahoga County.

Mr. John T. Corrigan, prosecuting attorney, for appellee.

Mr. Ralph D. Sperli, for appellant.

JACKSON, *J.* On June 12, 1975, defendant appellant, William Kiraly, and Joseph Gallo, were jointly indicted for the following criminal offenses: attempted aggravated murder in violation of R. C. 2903.01, R. C. 2923.02; aggravated arson in violation of R. C. 2909.02; and con-

spiracy to commit aggravated murder in violation of R. C. 2923.01. At arraignment defendant Kiraly entered a plea of not guilty.

A jury trial was commenced on November 13, 1975, with defendant Kiraly being tried separately from Joseph Gallo. Defendant was found guilty as charged on the aggravated arson and the conspiracy charges. The charge of attempted aggravated murder was quashed pursuant to R. C. 2941.32. Defendant was sentenced to serve from five to twenty-five years under each charge upon which he was convicted, the sentences to run concurrently.

It is from this judgment and sentence that defendant appeals. The following errors are assigned:

"First Assignment of Error.

"The Court erred as a matter of law and to the prejudice of the appellant in overruling the appellant's *Motion to Suppress Evidence* because the affidavit for the search warrant did not present a substantial basis for the court to find that the information was credible.

"Second Assignment of Error.

"The Court erred as a matter of law and to the prejudice of the appellant in overruling the appellant's *Motion to Suppress Evidence* because the affidavit upon which [39] the warrant issued contained material false or misleading statements as a result of the affiant's failure to disclose how he obtained hearsay information.

"Third Assignment of Error.

"The trial Court erred as a matter of law and to the prejudice of the appellant by not granting appellant's *Motion for a Mistrial* due to or in the alternative for not instructing the jury to disregard the testimony as to ap-

pellant's criminal reputation alleged when the appellant did not testify on his own behalf.

"Fourth Assignment of Error.

"The trial Court erred as a matter of law and to the prejudice of the appellant when it overruled appellant's *Motion for Judgment of Acquital* [*sic*] at the close of the State's case.

"Fifth Assignment of Error.

"The trial Court erred as a matter of law and to the prejudice of the appellant in allowing the State's witness, Tim Thomas, to make an in Court identification of the appellant, that he was not allowed to have the assistance of counsel at the lineup in which that witness identified appellant.

"Sixth Assignment of Error.

"The Court erred as a matter of law and to the prejudice of the appellant by not granting appellant's motion for a mistrial based on appellant's objection to the prosecutor's closing argument.

"Seventh Assignment of Error.

"The Court erred as a matter of law and to the prejudice of the appellant by denying his motion for a new trial.

"Eighth Assignment of Error.

"The trial Court erred as a matter of law and to the prejudice of the appellant by refusing to allow appellant's counsel to contact and obtain statements from jurors as to the effect the newly discovered evidence would have had on them.

"Ninth Assignment of Error.

"The trial Court erred as a matter of law and to the prejudice of the appellant by overruling appellant's *Motion* [40] *for Judgment of Acquital* [*sic*] at the close of appellant's case."

Defendant's fourth and ninth assignments of error, which challenge the sufficiency of the evidence at the close of the state's case and at the close of all the evidence will be considered first.

The record discloses that defendant presented evidence after the trial court denied his motion for acquittal at the close of evidence presented by the state; consequently, he is precluded from challenging the sufficiency of the evidence at the close of the state's case, *State v. Larry* (1975), 44 Ohio App. 2d 92. The fourth assignment of error by defendant is not well taken.

The record discloses the following testimony:

At approximately 3.30 or 3:45 on the morning of May 12, 1975, the combination office-residence of Daniel Greene was destroyed by an explosion. At the time of the explosion, the building was occupied by Daniel Greene and Miss Denise Schmidt. The explosion was caused by the detonation of four or five pounds of tetrytol, probably placed on the first floor of the building on the side facing Waterloo Road.

Shortly before the explosion Tim C. Thomas was in front of his house, not far from the residence of Daniel Greene, smoking a cigarette. At that time he observed a green Oldsmobile, with two individuals in the front seat, drive slowly in front of him and proceed toward an alley near the residence of Daniel Greene, where the car stopped briefly. The car then proceeded to turn into Water-

loo Road. Mr. Thomas, possibly because he heard a sound, walked to a driveway across the street where he observed a man carrying something behind the residence of Daniel Greene; Mr. Thomas lost sight of the man as the man went into an unlighted area. Mr. Thomas identified defendant as the man he saw behind the residence of Mr. Greene.

A 1974 green Oldsmobile Regency with license number EL 805 was seized by police and searched. This car was leased to Joe Gallo by Jet Auto Leasing. Mr. Thomas [41] identified this car as the one he had observed near the residence of Daniel Greene shortly before the explosion. Yellow particles were removed from the trunk of this automobile. Analysis of the particles indicated that they were tetrytol. Tetrytol is not available to the general public through lawful means.

Daniel Greene testified that he had seen defendant and Joe Gallo driving slowly in front of his house on May 9 and May 11 in a green Oldsmobile or Buick with license number EL 805, and in two different black Cadillacs on different occasions prior to May 9, 1975. Kevin McTaggert, a friend of Daniel Greene, testified that on May 6, 1975, at 10:30 p. m. he observed a 1973 or 1974 green Oldsmobile with license number EL 805 drive slowly in front of the residence of Daniel Greene, with the headlights off. Two men whom McTaggert was unable to see clearly, were in the car. Mr. McTaggert had observed defendant driving in the area in a black Cadillac on five or six prior occasions.

An FBI agent observed defendant's black Cadillac with license number EL 805 in front of Joseph Gallo's residence at 2 p.m. on May 6, 1975. On May 7, 1975, defendant's black Cadillac was again parked in front of

the residence of Joseph Gallo. However, on May 7, 1975, the black Cadillac bore license B 12285, while a green Oldsmobile bore license EL 805. At 7:30 p. m. Gallo and defendant left the area in the Oldsmobile.

The essential elements of the crime of aggravated arson, pursuant to provisions of R. C. 2909.02, are:

"(A) No person, by means of fire or explosion, shall knowingly:

"(1) Create a substantial risk of serious physical harm to any person;

"(2) Cause physical harm to any occupied structure."

There was evidence presented that the occupied residence of Daniel Greene was blown up by the explosive tetrytol. Defendant was seen near the residence shortly before the explosion carrying something. Particles of the explosive were found in the trunk of a car in which defendant [42] had been seen riding and which was seen in the immediate area shortly before the explosion.

We find the above evidence sufficient to support the jury's finding the defendant guilty of aggravated arson.

The provisions of R. C. 2923.01, relating to the crime of conspiracy, provide in part:

"(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, shall do either of the following:

"(1) With another person or persons, plan or aid in planning the commission of any such offense;

"(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

"(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed."

The provisions of R. C. 2903.01, relating to the crime of aggravated murder provide the following elements:

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

There was evidence adduced at trial that defendant and another person repeatedly drove slowly in the immediate vicinity of the residence of Daniel Greene in the [43] days and weeks preceding the demolition of the residence. Moreover, a car with two occupants who could not be seen clearly, in which defendant and another person had regularly been seen in the neighborhood, and which bore a license plate which had been seen on defendant's own car, was seen near the residence of Daniel Greene shortly before the explosion. As described in the preceding testimony, defendant was seen carrying an object in the yard of Daniel Greene just prior to the explosion.

The demolition of an occupied structure by two individuals is sufficient to indicate agreement to engage in conduct in which the object is purposely to cause the death of any occupants of the structure, and further indicates prior design and calculation.

Upon review of the record, we conclude that the evidence adduced at trial is sufficient to sustain the jury's verdict of guilty of conspiracy.

Therefore, we find the ninth error assigned by defendant to be without merit.

Defendant's first and second assignments of error contend that the trial court erred in overruling the motion by defendant to suppress evidence because of alleged defects in the affidavit for the search warrant. These assigned errors will be considered together.

Warrants may issue only upon a showing of probable cause. *United States v. Ventresca* (1965), 380 U. S. 102. In *Spinelli v. United States* (1969), 393 U. S. 410, the court, at 419, reviewed the concept of "probable cause":

"* * * In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 US 89, 96, 13 L Ed 2d 142, 147, 85 S Ct 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 US 300, 311, 18 L Ed 2d 62, 70, 87 S Ct 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common [44] sense, United States v. Ventresca, 380 US 102, 108, 13 L Ed 2d 684, 688, 85 S Ct 741 (1965); and that their determination of probable cause should be paid great def-

erence by reviewing courts, Jones v. United States, 362 US 257, 270-271, 4 L Ed 2d 697, 707, 708, 80 S Ct 725, 78 ALR 2d 233 (1960)."

In *Aguilar v. Texas* (1964), 378 U. S. 108, the court states at 111, that:

" 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States * * * at 333 US 13-14, 92 L Ed at 440."

The court goes on to say that the duty of the reviewing court is to determine whether the magistrate performed his "neutral and detached" function, i. e., to determine whether the magistrate drew reasonable inferences from the affidavit. To conclude that a reasonable inference of probable cause was drawn, the affidavit must set forth sufficient underlying circumstances to support the inference of probable cause. Additionally, where the affidavit relies on information supplied by an informant, there must be a basis on which to conclude that the supplied information is credible. *Aguilar, supra; Spinelli, supra; accord, State v. Dodson* (1974), 43 Ohio App. 2d 31.

The affidavit on which the challenged search warrant was issued was made by Andrew Vanyo, a member of the Intelligence Unit of the Cleveland Police Department. The defense sought to suppress evidence of particles of the explosive—which particles matched the explosive used in the bombing—found in the trunk of the green Oldsmobile with license EL 805.

The affidavit states in relevant part that:

A. The affiant was involved in the investigation of the bombing of the home of Daniel Greene.

B. The affiant averred that defendant and Joe Gallo [45] had extensive police records; that defendant and Joe Gallo had dealings with recent victims of gangland slayings and that a note removed from the automobile of one of the victims suggested that Daniel Greene was under surveillance.

C. Investigation by affiant revealed that a green Oldsmobile with license number EL 805 was leased to Joe Gallo, and that a black 1969 Cadillac was owned by defendant.

D. One informant advised that on May 9, 1975, he observed what appeared to be a black Cadillac bearing license EL 805 cruising in the vicinity of the Daniel Greene home. A second informant advised that at approximately 10 p. m. on May 11, 1975, he observed a black Cadillac with license EL 805 stop in front of a tavern several doors from the residence of Danny Greene. A third informant, apparently relating a report from Daniel Greene, advised that on May 7, 1975, an automobile appearing to be a 1973 green Buick with license plate EL 805 was seen driving near the home of Daniel Greene.

E. The affiant stated that FBI agents had under surveillance the black Cadillac of defendant and the green Oldsmobile of Joe Gallo, and that their observations put both Joe Gallo and defendant together in both the Cadillac and Oldsmobile.

We find the above portions of the affidavit to give sufficient underlying circumstances to support a finding of probable cause and consequently to support the issu-

ance of a search warrant. When the criminal background of the defendant and Joe Gallo and their relationship with each other and relationship with victims of gangland slayings, who in turn left evidence of surveillance of Daniel Greene, are coupled with observations of cars belonging to defendant and leased to Joe Gallo being in the immediate vicinity of the residence of Daniel Greene in the days preceding the bombing, there is a common sense basis on which to conclude that incriminating evidence could be found in one of the cars. The credibility of observations by the informants derives from the separate observations in which there apparently was a switching of license [46] plates, and the related observations by the FBI which put both defendant and Joe Gallo together in both cars.

Defendant's first and second assignments of error are not well taken.

Defendant's third assignment of error argues that the trial court erred by not granting the motion by defendant for mistrial because of certain testimony suggestive of defendant having a criminal reputation, or in the alternative, for not instructing the jury to disregard that testimony. Defendant points specifically to testimony of an FBI agent to the effect that the defendant was under surveillance by the organized crime unit of the FBI and that defendant had nicknames of "Mo" and "The Mechanic" known to the FBI.

In *State v. Craven* (1973), 35 Ohio St. 2d 18, the court, citing *State v. Doll* (1970), 24 Ohio St. 2d 130, states at 22, that, "[t]he inflammatory effect that results from the introduction of evidence tending to show the commission of another offense by the defendant was recognized as generally so prejudicial as to justify a reversal under the facts of that case." The court held in *Doll* that:

"Evidence is admissible where it is of sufficient force that it logically tends to prove or disprove a fact or issue necessary to a decision in a particular case, unless such evidence is excluded by a rule of law or policy not primarily concerned with the probative force of evidence." Paragraph 3 of the syllabus.

In the present case we do not find the admission by trial court of evidence alleged by appellant to be suggestive of criminal reputation to constitute prejudicial error.

Testimony that an individual was under surveillance and that the individual was known by nicknames to certain agents of the FBI is not unduly suggestive of a criminal reputation in the manner of testimony of prior convictions of the defendant. Recent disclosures about the scope of FBI surveillance suggests that many individuals never convicted of offenses may at times have been under surveillance.

Additionally, testimony that defendant was under surveillance constituted necessary background for testimony [47] that defendant and Joe Gallo had been observed together prior to the bombing. Testimony that defendant and Joe Gallo were together is relevant to establish agreement, an element of conspiracy. This testimony, therefore, satisfies the test enunciated in *Doll, supra.*

"Conspiracy and common purpose among two or more persons, to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct.

"Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." *State v. Pruett* (1971), 28 Ohio App. 2d 29.

The third error assigned by defendant is not well taken.

Defendant's fifth assignment of error contends that the trial court committed prejudicial error in not permitting defendant's counsel to be present at the lineup in which Tim Thomas identified defendant. Defendant does not develop facts to indicate that the lineup was unnecessarily suggestive or conducive to an irreparable mistaken identification. In his appellate brief at page 24, defendant simply claims that "since appellant was denied the right to have his attorney present, there is no way of knowing how prejudicially the lineup was conducted."

Defendant relies on *Kirby v. Illinois* (1972), 406 U. S. 682. The Ohio Supreme Court in *State v. Sheardon* (1972), 31 Ohio St. 2d 20, cites *Kirby* to set forth the following two-part test with regard to the right to counsel at a pre-trial identification:

"1. The rule of *United States v. Wade* (1967), 388 U. S. 218, and *Gilbert v. California* (1967), 388 U. S. 263, relative to the Sixth Amendment right to counsel at post-indictment confrontations, does not apply to confrontations conducted before the defendant has been indicted or otherwise formally charged relative to the crime in question. (*Kirby v. Illinois* [decided June 7, 1972], ... U. S. ....., followed.)

"2. The due process clause of the Fifth and Fourteenth [48] amendments forbids any pre- or post-indictment lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. (*Kirby v. Illinois* [decided June 7, 1972], ... U. S. ....., followed.)"

An arrest warrant for defendant was issued on May 16, 1975. Defendant was arrested and bond was set on June 10, 1975. The lineup was conducted on June 11,

1975. Defendant was indicted on June 12, 1975. The challenged lineup was pre-indictment.

Defendant argues, in effect, that since an arrest warrant had been issued and since bond had been set prior to the lineup, that defendant had been "formally charged" despite his not yet being indicted. As a result, defendant urges that defendant had a right to counsel at the lineup. We agree.

It seems clear on this record that at the time of the lineup defendant was "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra* at 689. By the act of setting bond, we find it implicit that a "formal charge" had been brought.

The court, in *Gilbert v. California* (1967), 388 U. S. 263, imposed a *per se* exclusionary rule for testimony of a lineup identification where counsel was improperly prevented from being present. The court states, at 273, "[o]nly a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." In the present case, the trial court properly refused to allow testimony as to the lineup identification of defendant by Timothy Thomas.

The court, in *United States v. Wade* (1967), 388 U. S. 218, considered the question of whether an improper denial of counsel at a lineup would require a *per se* exclusion of an in-court identification. The court declined to impose such a *per se* exclusion noting that the government should first be given an opportunity "to establish by clear and convincing evidence that the in-court identifications [49] were based upon observations of the sus-

pect other than the lineup identification." *Id.*, at 239, 240.

In determining whether the in-court identification was based upon observations other than the lineup identification, the court found, at 241, that the following factors should be considered, "the prior opportunity to observe the alleged criminal act, the existence of any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup."

In the present case, under the following analysis of the above factors, we agree with the conclusion by the trial court allowing in-court identification of defendant by Thomas. Thomas testified that he saw defendant for from six to ten seconds, with defendant under a spotlight at a distance of from 45 to 50 feet, and that defendant looked directly at Thomas during that time. In the initial description of defendant given by Thomas, Thomas failed to include hair color, glasses and mustache. Thomas did not identify defendant to police in a photographic array; however, Thomas stated, "* * * I looked at about twenty-five pictures, I think, a bunch of them * * *. I recognized him then, but I didn't say anything * * * I wanted to see the lineup." Later Thomas added that he did not identify the photo because he didn't want to become involved. The lapse of time from the bombing to the lineup was one month.

Prior to the lineup Thomas stated that he was told that defendant might or might not be in the lineup.

Thomas was further told that if he did not see the man whom he saw behind the Greene residence to say so and "that would be it." The judge was shown a photo of five men in the lineup besides defendant and concluded that they were of the same size and hair color, although none had [50] the identical hair style. Defendant showed a very high degree of certainty in the lineup identification. "I am so sure that my hands were shaking" and "I knew him when I first walked through the door."

We agree with the trial court's determination allowing the in-court identification primarily because of the opportunity Thomas had to observe defendant the night of the bombing and because of the apparent regularity, except for the absence of counsel, in the conduct of the lineup itself, coupled with the certainty of the identification by Thomas.

Defendant's fifth assignment of error, is, therefore, without merit.

The sixth assignment of error contends essentially that defendant was denied a fair trial because of alleged error in the closing argument by the prosecution. Defendant claims that the prosecutor improperly referred to defendant as a part of organized crime and improperly characterized him as a "professional hit man" and a "killer."

This court has held that:

"It is a broadly accepted general principle that a prosecution argument outside the record, which influences the jury adversely to the defendant, denies the defendant a fair trial." *State v. Watson* (1969), 20 Ohio App. 2d 115, 124.

The prosecution is, however, given some latitude in closing argument. *State v. Woodards* (1966), 6 Ohio St.

2d 14. In *Woodards* the closing argument by the prosecution included the following statements:

"'* * * Woodards is a misfit like a gangrenous leg on a diabetic body, like an inflamed, useless appendix that threatens the body, the body and the society of the state of Ohio.

"'He caused a cruel, unnecessary death. He asks mercy from you. Yet, he showed none.

"'Remove him from society like you would a parasite. * * *'"

The court found these statements "intemperate" and [51] indicated that such remarks "might better have been left unsaid," but concluded in part that, "The jury should be given credit for sufficient common sense and sound judgment to discount the remarks made in this case." *Id.*, at 24.

In *United States v. Socony-Vacuum Oil Co.* (1940), 310 U. S. 150, the court in finding the closing argument not violative of due process rights noted that the challenged statements, although improper, were relatively isolated instances in a lengthy trial and summation. See generally, 40 L. Ed. 2d 886.

The bulk of the closing argument in the present case was devoted to summarizing the evidence. The prosecution did, however, include comments connecting defendant with organized crime of which there is relatively little evidence in the transcript. While we, under the posture of the evidence herein, are critical of the references by the prosecution to defendant as a "killer" and as a "professional hit man," and although we do not approve of the comments by the prosecution connecting defendant with organized crime without a more substan-

tial evidentiary basis, we find such references to be of the type that a jury would discount, since the overwhelming emphasis of the closing argument is on the evidence and the evidence itself provides a sound basis for the judgment.

The sixth error assigned by defendant is not well taken.

The seventh assignment of error by defendant charges error by the trial court in denying his two motions for a new trial, the first motion being filed January 12, 1976, and the second being filed January 24, 1977. Both motions pere premised on newly discovered evidence.

We do not consider the denial by the trial court of the January 24, 1977, motion for new trial for the reason that this motion failed to comply with Criminal Rule 33(B). This rule provides in part that:

"Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, [52] or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, *such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.*" (Emphasis added.)

The judgment entry finding defendant guilty was filed December 2, 1975; defendant's second motion for new trial was filed more than 120 days after the verdict. Criminal Rule 33(B) requires that this motion be filed within seven days of an order finding that defendant was unavoidably prevented from finding such evidence

within the 120-day period. No such order was filed in the seven days prior to the filing of the motion for new trial. Consequently, defendant's second motion was not properly before the trial court.

Criminal Rule 33(A)(6), relating to grounds for a new trial, provides in part:

"(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

"* * *

"(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *"

The granting of a motion for a new trial is necessarily committed to the wise discretion of the trial court and a reviewing court cannot reverse that decision unless an abuse of discretion is demonstrated. *State v. Williams* (1975), 43 Ohio St. 2d 88; *State v. Lopa* (1917), 96 Ohio St. 410.

The following guidelines for granting a motion for a new trial have been enunciated by the Ohio Supreme Court:

"To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence [53] (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v.*

Petro (1947), 148 Ohio St. 505, and *approved* in *State v. Lewis* (1970), 22 Ohio St. 2d 125.

The record reveals that a closed hearing[2] was held by the trial court on January 23, 1976, on the first motion by defendant for a new trial. Defendant urges on appeal that a new trial should have been granted so as to include the testimony of the uncle and the stepfather of the state's eyewitness, Timothy Thomas.

At the hearing the testimony by the stepfather of Timothy Thomas was not damaging to the credibility of Thomas. The stepfather testified that Thomas never told him that he was being paid by Daniel Greene; that Thomas never told him that he had lied; that Thomas had seen two men the night of the bombing; and that he recognized a car on the night of the bombing. The stepfather did say that Thomas had told him that he wanted to work for Daniel Greene.

The uncle of Timothy Thomas testified that Thomas had told him that he [Thomas] was going to be taken care of by Daniel Greene and that he [Thomas] performed two favors for Daniel Greene, one of which was an "out-and-out lie." The uncle testified that he did not know whether or not the "out-and-out lie" had anything to do with the testimony of Thomas at trial.

We are not persuaded that the trial court abused its discretion in denying defendant's motion for a new trial for the following two related reasons. First, the testimony of the uncle of Timothy Thomas would serve only indirectly to impeach the credibility of Thomas, and impeachment [54] is typically an inadequate basis for

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2. The trial court instructed that those people in the closed hearing not reveal the names of the witnesses.

granting a new trial. Secondly, we find this testimony no more destructive to credibility of the prosecution witness than the testimony of David McKinley, who testified at trial that Thomas related to him a somewhat different account of the circumstances surrounding the explosion than Thomas had related at trial. Consequently, the testimony of the uncle of Thomas does not disclose a strong probability that his testimony would change the result as required under the holding in *Petro, supra.*

We find defendant's seventh assignment of error not well taken.

Defendant's eighth assignment of error is that the trial court erred in not allowing defendant to contact jurors to obtain statements as to the effect the newly discovered evidence would have had on their decision. Defendant cites no authority that authorizes this procedure.

The standards for granting a new trial on the basis of newly discovered evidence were set forth in *Petro, supra.* These standards do not include a polling of prior jurors. Such a procedure could impose substantial hardships on jurors. *See* Local Rule 22(D), Cuyahoga County Common Pleas.

Consequently, we do not find merit in the eighth error assigned by defendant.

Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed.

DAY, *C. J.*, concurs.

KRENZLER, *J.*, concurs in the judgment only.

KRENZLER, *J.*, concurring in the judgment only. I concur in the judgment only. I wish to make some comments, however, with respect to the seventh assignment of error.

The appellant filed two motions for a new trial. The first motion was based on newly discovered evidence and was timely filed on January 12, 1976, within 120 days after the verdict was rendered as required by Criminal Rule 33(B). The second motion, also based on newly discovered [55] evidence, was filed on January 24, 1977, nearly 14 months after the trial court's verdict of November 28, 1975.

With respect to the second motion, clarification of the procedural requirements for a motion for new trial on account of newly discovered evidence made after 120 days following the verdict is warranted.

In general, motions for a new trial based on new evidence must be filed within 120 days after the verdict or decision of the trial court. Crim. R. 33(B). Criminal Rule 33(B) permits such motions to be filed after the 120 day time period but establishes as a prerequisite for such late filing a court order finding "by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely." Although the rule does not precisely define the function which the court order serves, it effectively gives the movant an extension of time or judicial leave to file his motion for a new trial.

To obtain the court order containing the finding of unavoidable prevention, the defendant must apply for such an order from the court by motion. Criminal Rule 47 and Criminal Rule 33 establish that it is the defendant's burden to show by clear and convincing proof that

he was unavoidably prevented from discovering the new evidence within the 120-day time period. The rule is silent as to the evidentiary material which the defendant must submit to meet his burden of proof but clearly more than mere allegation of unavoidable prevention is required.

Once the court has made the required finding by its order, Criminal Rule 33(B) requires that the defendant's motion for a new trial based on newly discovered evidence be filed within seven days after the order. When filed no later than seven days after the order, the motion for a new trial is properly before the trial court and the provisions of Rule 33 apply to this motion as they would for any other motion for a new trial made on the ground of newly discovered evidence.

It should be noted that the defendant may choose to file his new trial motion together with his motion applying for the court order finding unavoidable prevention. [56] In any event, however, a motion for new trial on account of newly discovered evidence made after the 120-day time period is not properly before the trial court until the court has entered the requisite order.

The record in this case indicates that on October 27, 1976, eleven months after the jury verdict rendered against him, the appellant filed a motion in the trial court entitled "Application for permission to file affidavits in support of a motion for a trial." The application sets forth the circumstances attendant to the appellant's discovery of an available witness in his behalf and certain other evidence. No affidavits or other material were attached to the motion.

The motion did not request a court order finding that he was unavoidably prevented from timely discovering

his new evidence and the appellant did not subsequently apply for such a court order. On January 24, 1977, the appellant filed his second motion for a new trial with certain affidavits attached. By its entry of January 25, 1977, the court granted the motion to file affidavits and denied the motion for a new trial.

The appellant did not expressly request nor receive a court order finding unavoidable prevention and the appellant's motion for permission to file affidavits cannot be deemed a substitute for such a request because it did not include a request for and did not result in the requisite court order.

Therefore, the appellant's second motion for a new trial was not properly before the trial court and could not be considered on its merits. This being so, this court cannot in this appeal consider the merits of the appellant's second motion for a new trial.

Criminal Rule 33 does not place a time restriction upon when motions applying for a court order finding unavoidable prevention may be made. Therefore, the appellant is not precluded from making such application by motion to the trial court at this time, obtaining the required order and filing his second motion for a new trial anew.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

(Dated December 22, 1977)

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee,

vs.

WILLIAM KIRALY,
Appellant.

JOURNAL ENTRY

Motion by appellant for reconsideration of ruling as to the seventh assignment of error overruled.

The defendant-appellant's seventh assignment of error was overruled on procedural and not on substantive grounds. The basis of this decision was that the defendant-appellant did not comply with the procedural requirements of Criminal Rule 33(B) and that the motion for a new trial was not properly before the trial court. Based on this reasoning, the sufficiency of the affidavit of Ralph D. Sperli and George Morgan could not be decided by either the trial court or this court. Thus, whether the evidence contained in the affidavit warranted a new trial was not before the court. Inasmuch as there is no time limit provided for in Criminal Rule 33, the defendant-appellant is not precluded from complying with its provisions requiring a trial court finding that he was unavoidably pre-

vented from discovering the new evidence within the one hundred twenty day period. Exc.

DAY, *C. J.*,
KRENZLER, *J.*,
JACKSON, *J.*, concur

/s/ LEO A. JACKSON
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated January 25, 1977)

CUYAHOGA COUNTY

STATE OF OHIO
Plaintiff

vs. INDICTMENT

WILLIAM KIRALY
Defendant

JOURNAL ENTRY

Application for permission to file Affidavits in Support of Motion for New Trial, granted. Motion for New Trial, overruled.

/s/ LLOYD O. BROWN
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated January 30, 1977)

STATE OF OHIO
Plaintiff

vs.

WILLIAM KIRALY
Defendant

INDICTMENT
Att. Aggr.
Murder w/cts

JOURNAL ENTRY

Amended Journal Entry to clarify entry of January 25, 1977.

(Criminal Journal Book 290-page 971)

Upon showing of clear and convincing proof that the defendant was unavoidably prevented from the discovery of new evidence, the defendant's Motion for permission to file a Motion for a New Trial, (filed October 23, 1977), is granted.

On the basis of the Affidavits contained in the Motion for a New Trial, (said Motion being filed within the seven day period of the granting of permission to file), the Motion for New Trial is overruled, in that the affidavits do not present evidence which warrants the granting of a New Trial.

/s/ LLOYD O. BROWN
Judge